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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-404

DISPOSABLE SERVICES, INC.,

Petitioner,

vs.

ITT LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

In November, 1969, Samuel Lee Britt ("Britt") made application to respondent, ITT Life Insurance Company of New York ("respondent") for a policy of endowment insurance on his life in the face amount of $75,000 (Def's Ex. 6, T 47, 109).[1] In his application, Britt designated his employer, petitioner Disposable Services, Inc. ("Disposable Services"), as owner and beneficiary, and represented, in answer to questions 6, 7 and 8, part 2 of his application, that he was not contemplating any operation, medical treatment or procedure, and that he was then in good health and free from any impairment (Def's Ex. 6, T 114). In addition, Britt represented that he had not sought treatment or consulted a physician for any reason whatever in the last five years, except for a bee sting on his left arm in 1969, that he had never been in any hospital or sanitarium for rest, treatment, observation or diagnosis, except for an appendectomy in 1954, that he had never had or been advised to have any x-rays, electrocardiograms, blood studies or other tests, except for a chest x-ray in 1952 while in the U.S. Army, that he had never had or been told by any physician or practitioner that he had kidney disease, kidney stones or prostate trouble and that he had never had or been told by any physician or practitioner that he had cancer or any other physical or mental disorder, operation or injury not included in the application (Def's Ex. 6, T 115-116).

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[1]As used in this brief, the abbreviation "Def's Ex." refers to Defendant's Exhibit by that number in evidence at the trial and the abbreviation "T" refers to the original trial transcript.

Since Britt's application for insurance depicted a man in perfect health, it was approved by respondent on December 11, 1969 and, shortly thereafter, Policy 21576 was mailed to Disposable Services in Florida (Def's Ex. 7, T 47-48, 117, 145-146). The policy, however, provided that it would:

> "[N]ot take effect until . . . delivered and the first premium paid during the lifetime of the insured." (Def's Ex. 7, T 147).

Despite this condition precedent to the policy's effectiveness, Britt did not send a check to respondent in payment of the first premium until at least February 5, 1970, respondent did not receive that check until February 9, 1970 and the check was not paid until February 13, 1970 (T 48, 149-150).[2]

Britt died in South Miami Hospital on May 24, 1970 of:

> "Carcinoma of the abdomen either from the sigmoid or from the pancreas with multiple metastasis throughout the peritoneal surfaces including obstructive lesions in the small bowel and in the distal ileum and obstructing lesions in the area of the cecum and ascending colon." (Def's Ex. 2)

Respondent proved at trial that Britt had not been feeling well since late December, 1969, when he began to lose weight (T 122). His wife knew this, and so, too, did

[2]The parties were unable to agree upon, or offer proof of, the date on which this first premium check was actually mailed.

the people with whom he worked (T 82, 91, 140, Def's Ex. 8). Beginning in late January, 1970, Britt began experiencing considerable pain in his lower left back which prevented him from going to sleep and caused him considerable discomfort (T 119-120). On February 3, 1970, Britt consulted Dr. Henry Bryant about his back pain.

Dr. Bryant testified that he:

> ". . . thought that he did have something definitely wrong with his kidney due to an obstruction or infection and recommended that he go in the hospital and be checked in to find out the cause." (T 120).

Britt was admitted to South Miami Hospital on February 5, 1970, the earliest date upon which Britt could have forwarded the premium check to respondent (Def's Ex. 2). By that time Britt knew that several of the representations that he made to respondent in his application for insurance were no longer true. Specifically, Britt knew that he had been to Dr. Bryant with complaints of an unknown origin, that he was to be admitted to a hospital for exploratory tests, that he had lost considerable weight, and that there was or, at least, might be something wrong with his kidney (T 119-122).

On February 8, 1970, one day before respondent received Britt's check, x-rays taken of Britt's left kidney had disclosed the existence of a tumor "most likely malignant" obstructing his colon and ureter (Def's Ex. 2, T 122-123, 125). Dr. Bryant had explained to Britt on that day the

"[P]ossible causes for pathology found. He and his wife both know that cancer of colon is very likely. Will schedule [operation] for next day or two." (Def's Ex. 2, T 125-126)

Needless to say, it is undisputed that respondent would never have accepted that check if it had known the rapidly deteriorating state of Britt's health (Def's Exs. 5-A and 5-B, T 162-167, 169-172, 176-179, 181-185).

DECISION BELOW

The District Court, having reached the conclusion that Britt did not have a duty to inform respondent of the changes in his health which rendered several of his representations to respondent no longer true, directed a verdict for Disposable Services and entered judgment in its favor.

The Court of Appeals for the Fifth Circuit, holding that Britt was under an affirmative duty to inform respondent of the changes in his health and of the incorrectness of several of his representations, unanimously reversed the judgment entered by the District Court and ordered judgment to be entered for respondent as a matter of law. On a motion for rehearing, the Court of Appeals reaffirmed its prior holding but one judge modified his position, not because of his disagreement as to the applicable Florida law but for the reason that, in his view, a question of fact existed for determination by the jury.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the Constitutional and statutory provisions listed by Disposable Services, this petition also involves 28 U.S.C. §2106.

"§2106. **Determination.**

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 62 Stat. 963, Chap. 646 (1948).

ARGUMENT

POINT I

THE DECISION OF THE COURT OF APPEALS ACCORDS WITH APPLICABLE STATE LAW.

Certiorari, being a discretionary writ, is only granted where the question presented is one of major importance and the decision of the Court of Appeals conflicts with applicable state law. S.C.R. 19(1); **Rice v. Sioux City Memorial Park Cemetery, Inc.**, 349 U.S. 70 (1955); **Layne & Bowler Corp. v. Western Well Works, Inc.**, 261 U.S. 387 (1923).

In the case at bar, the Court of Appeals held as a matter of law that Britt had the obligation to disclose to respondent that the representations in his application for insurance were no longer true when he finally mailed his first premium payment to respondent. Since it was undisputed that grave changes had occurred in Britt's physical condition subsequent to the date of his application and that respondent, if it had known of these changes, would have refused to accept the premium check, the Court of Appeals concluded that respondent, under Florida law, was entitled to rescind the policy in suit (App. 4-5). Petitioner contends that the Court of Appeals' decision conflicts with Florida law.

In 1967, the Supreme Court of Florida said, in answer to an express question posed to it by the Court of Appeals for the Fifth Circuit, that

> ". . . misrepresentations in an application for insurance, material to the acceptance of the risk, do not have to be made with knowledge of the incorrectness and untruth to vitiate the policy." **Life Insurance Company of Virginia v. Shifflet**, 201 So.2d 715, 719 (Fla. 1967).[1]

Thus, Florida law has been clearly announced by its highest court.

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[1]That decision of the Supreme Court was re-affirmed in the case of *National Standard Life Insurance Company v. Permenter*, 204 So.2d 206 (Fla. 1967), with the proviso that, in the absence of fraud, or reckless conduct, subjective opinions by the insured concerning his good health ought not, in and of themselves, to vitiate a policy of life insurance.

In the case at bar, it is undisputed that on February 3, 1970 Britt was suffering from severe pain in the lower back which caused him to consult a physician, that he had lost considerable weight during the prior few months, and that he had been told by his physician to go into a hospital for exploratory tests (T 120-122). Manifestly, as of this date, Britt's answers to questions 6 and 7 in his insurance application to respondent were false in a material respect. Dr. Bryant's belief that Britt had a blockage of the kidney was confirmed on February 6, 1970 when x-rays revealed a tumor (Def's Ex. 2, T 122-123, 125). At that time, Dr. Bryant made a clinical diagnosis of cancer of the sigmoid colon (Def's Ex. 2, T 125-126) and this was confirmed by surgery on February 10, 1970. Surgery also revealed that the cancer had spread throughout Britt's abdominal cavity (Def's Ex. 2). Given the state of Britt's health and his undisputed knowledge on February 3, 1970 of the rapidly deteriorating state of his health which had caused Dr. Bryant to recommend hospitalization, the Court of Appeals held that respondent was entitled under Florida law to judgment as a matter of law.

In an effort to have this Court grant its petition for a writ of certiorari, Disposable Services has contended that the Court of Appeals' decision in the case at bar conflicts with the decision of the Florida Supreme Court in **National Standard Life Insurance Company v. Permenter**, 204 So.2d 206 (Fla. 1967). Disposable Services has, in fact, attempted to create a conflict between the **Permenter** and **Shifflet** cases, which were decided only a few weeks apart by the Florida Supreme Court. In **Permenter**, after dismissing an appeal for lack of jurisdiction, several judges, in a concurring opinion, said that the decision in **Shifflet**,

supra, which they reaffirmed as being correct on its facts, "may be too sweeping . . ." 204 So.2d at 207. Expressing a preference for a case by case consideration of the matter, the judges noted that:

> "An incorrect statement in order to be material and vitiate a policy must be one given by the insured in response to a question he understood or reasonably should have understood, or one which reasonably he could be expected to have sufficient information to answer or state he lacked knowledge to give a responsive answer." 204 So.2d at 207.

This revised formulation does not assist Disposable Services in the slightest since there is no suggestion in the record that Britt did not understand the questions in his application or that he lacked information bearing on his health needed to give responsive and accurate answers to respondent. As the judges of the Florida Supreme Court said in their concurring opinion in **Permenter, supra**:

> ". . . cases involving excusable statements of judgment or opinion should not be analogized to those where an applicant makes careless or reckless statements positively as true when he has no knowledge as to whether such statements are in fact true, and as a fair and reasonable man should have indicated he was without sufficient knowledge to give an answer." 204 So.2d at 207.

Unquestionably, Britt knew on February 3, 1970 that many of his representations were false and also that he lacked knowledge as to whether many of his other representations were still true.

Contrary to petitioner's further contention, nothing in **Tucker v. Travelers Insurance Company**, 233 So.2d 198 (Fla.App. 1970), suggests that **Shifflet** was overruled by **Permenter**. Actually, in **Tucker**, the court unanimously affirmed a judgment for the insurer because there were clear misrepresentations in the application for insurance that were material to the risk, "even though the omissions may have been made without bad faith or fraudulent intent. . . ." 233 So.2d at 201.

The test, of course, and this is the point of the concurring opinion in **Permenter**, is whether there is a clear misrepresentation of fact in the application for insurance. If there is such a misrepresentation and if the question is a material one which could not have been misunderstood by the applicant and to which he could have indicated that he lacked sufficient knowledge to give a responsive answer, then the policy can be vitiated under either subsection 2 or 3 of Section 627.01071 of the Florida Statutes Annotated. As the Florida Supreme Court in **Shifflet** stated:

> "In as much as we think the statute is unambiguous and is susceptible of but one interpretation we find there is no necessity for construction. We accord the statute its plain and obvious meaning and hold recovery under the policy is precluded if the misrepresentation is material

to the acceptance of the risk or if the insurer in good faith would not have issued the policy in the terms it was issued.

* * *

We hold misrepresentations in an application for insurance, material to the acceptance of the risk, do not have to be made with knowledge of the incorrectness and untruth to vitiate the policy. This conclusion appears to be in harmony with the general rule approved in other jurisdictions." 201 So.2d at 719-720.

Disposable Services also contends that the Court of Appeals ignored Florida law in holding that Britt had an affirmative duty to inform respondent that his representations in his application were no longer true. The simple answer to this assertion is that Florida imposes such a duty, as do most other jurisdictions. In **Massachusetts Bonding & Insurance Company v. Hoxie**, 176 So. 480 (Fla. 1937), the Florida Supreme Court held that insureds are under a continuing duty to inform the insurer of changes in the subject matter of the insurance during the period between the application for the policy and the effective date of the policy and clearly indicated that this doctrine is applicable to policies of life insurance. 176 So. at 482. Florida law on this subject was reaffirmed in **Travelers Insurance Company v. Wilkins**, 33 F.Supp. 117 (S.D. Fla. 1940). This same position was accepted over 40 years ago by this Court in **Stipcich v. Metropolitan Life Insurance Company**, 277 U.S. 311 (1928),

and has been adopted in most jurisdictions where the question has arisen.[4]

In the instant case, it is clear that there was a total change in the subject matter of the insurance, of which the insured was well aware, before respondent ever received the first premium. Since this change occurred before Policy 21576 took effect, **Merry v. Danko**, 33 Fla. Supp. 205 (Cir. Ct. 1970); **Our Home Life Insurance Company v. Peacock**, 71 Fla. 35, 70 So. 775 (1916), judgment for respondent was, as the Court of Appeals correctly held, required as a matter of law.

What Disposable Services is attempting to do is to have this Court grant a writ of certiorari so that it can disagree with the Court of Appeals' application of Florida law to the facts of this case. Yet, the Court of Appeals were established so that this Court would not have to deal with that very type of question. **Rice v. Sioux City Memorial Park Cemetery, Inc., supra** at 73-74; **Layne & Bowler Corp. v. Western Well Works, Inc., supra** at 393.

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[4] *Accord, New York Life Insurance Co. v. Gay*, 36 F.2d 634 (6th Cir. 1929); *Cohen, Friedlander & Martin Co. v. Massachusetts Mutual Life Insurance Co.*, 166 F.2d 63 (6th Cir. 1948), *cert. den.*, 334 U.S. 820 ( ); *Goldstein v. New York Life Ins. Co.*, 176 App. Div. 813, 162 N.Y. Supp. 1086 (1st Dept. 1917), *aff'd*, 227 N.Y. 575 (1917); *Whitley v. Peidmont & Arlington Life Ins. Co.*, 71 N.C. 480 (1874); *Pierre v. Metropolitan Life Insurance Co.*, 22 Cal. App. 2d 346, 70 P. 2d 985 (1937); *Moore v. American Home Mutual Life Insurance Co.*, 174 S.W. 2d 788 (Tex. Civ. App. 1943); *Metropolitan Life Insurance Co. v. Somers*, 137 N.J. Eq. 419, 45 A. 2d 188 (1946); *Lennon v. John Hancock Mutual Life Insurance Co.*, 339 Mass. 37, 157 N.E. 2d 518 (1959); *Fjeseth v. New York Life Insurance Co.*, 20 Wis. 2d 295, 122 N.W. 2d 49 (1963). *See* 43 Am. Jur.2d §733 (1969).

In conclusion, the issue on this petition, the issue which the Court of Appeals correctly decided, is not, as Disposable Services contends, whether Britt knew he had cancer, but rather whether Britt, who concededly knew he was ill before the policy took effect, had a duty to inform respondent that the representations in his application were no longer true and whether respondent is entitled, as a matter of law, to a rescission of the policy for his failure to do so. Clearly, Florida law, as does the law of virtually every jurisdiction, imposed such a duty on Britt, a duty which he admittedly failed to meet. The decision of the Court of Appeals unquestionably accords with the law of the State of Florida.

POINT II

DISPOSABLE SERVICES WAS NOT DENIED ITS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Disposable Services has also attempted to keep its cause of action alive by claiming that the Court of Appeals exceeded its power in directing entry of a judgment for respondent. Courts of Appeals have been given the right by Congress to "direct the entry of such appropriate judgment . . . as may be just under the circumstances". 28 U.S.C. §2106. As this Court recently held in **Neely v. Eby Construction Co.**, 386 U.S. 317 (1967):

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment **n.o.v.** than when

> a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v." 386 U.S. at 322.

The Court in **Neely** also went on to say that there is no justification for

> ". . . an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 [of the Federal Rules of Civil Procedure] to speed litigation and to avoid unnecessary retrials. Nor do any of our cases mandate such a rule." 386 U.S. at 326.

In the case at bar, the Court of Appeals ruled that, based on the undisputed facts of Britt's health and the undisputed state of Britt's knowledge on February 5, 1970, respondent was entitled to judgment as a matter of law since Florida law imposed a duty on Britt to inform respondent that his representations in his application were no longer true. This determination of law left no factual issue to be decided and the Court of Appeals was correct in directing entry of judgment for respondent.

The cases cited by Disposable Services in its petition are completely inapposite. **National Labor Relations Board v. Waterman Steamship Corp.**, 309 U.S. 206 (1940), cited at page 25 of the petition for certiorari, dealt with the standards to be applied in reviewing factual determinations by an administrative agency. **Beacon Theatres, Inc. v. Westover**, 359 U.S. 500 (1959), cited at page 26 of the petition for certiorari, only held that, where equitable

and legal issues are joined in one lawsuit, the trial court may not deprive a litigant his right to a jury trial on all issues of fact subsidiary to the legal cause of action by first deciding those subsidiary issues as part of the equitable cause of action.

In the case at bar, the Court of Appeals has decided a question of law which, once decided, precludes Disposable Services from recovering anything in this action. Such a ruling is not a deprivation of the right to a jury trial since that right does not exist with respect to issues of fact as to which "there can be but one reasonable conclusion . . ." **Brady v. Southern Railroad,** 320 U.S. 476, 479 (1943). Plainly, Disposable Services was not deprived of its right to a jury trial in contravention of the Seventh Amendment.

CONCLUSION

For all the foregoing reasons, the petition for certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

William E. Kelly,
James M. Shaughnessy,
Robert E. Venney,
Attorneys for Respondent.

By _____

Of Counsel:
CASEY, LANE & MITTENDORF,
26 Broadway
New York, New York 10004.

GUNN, VENNEY AND BUHLER
1525 Alfred I. DuPont Building,
Miami, Florida 33131.

Counsel of Record:
ROBERT E. VENNEY
1525 Alfred I. DuPont Building
Miami, Florida 33131